No. 00-132

IN THE
Supreme Court of the United States

DARRYL SINKFIELD, QUINTON ROSS, BERNEST BROOKS, RUBIN MCKINNON, AND ANDREW HAYDEN, *Appellants,*

v.

PEGGY C. KELLEY, et al., *Appellees.*

On Appeal from the United States District Court for the Middle District of Alabama

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BRIEF OF DARRYL SINKFIELD, ET AL. OPPOSING MOTION TO DISMISS OR AFFIRM

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BRIEF OF SINKFIELD ET AL. OPPOSING MOTION TO DISMISS OR AFFIRM

Shaw v. Reno, 509 U.S. 630 (1993) (*Shaw I*), and its progeny were never intended to give federal courts a roving warrant to police the often messy, exquisitely sensitive process of redistricting. Rather, this Court's *Shaw* jurisprudence was intended to permit federal judicial intervention in the unusual situation in which race has played so predominant a role in redistricting that it threatens to impose a direct injury on identifiable individual citizens. *United States v. Hays*, 515 U.S. 737 (1995), confirmed this understanding by limiting standing in *Shaw* cases only to voters who could show that "they, *personally*, have been subjected to a racial classification," *id.* at 739 (emphasis added), and are not circumventing "[t]he rule against generalized grievances ...." *Id.* at 743.

Thus, it is not enough for individual citizens who object to a state's redistricting processes to show race was taken into account. Rather, for a citizen to have standing, she must show that she herself was purposefully assigned to a district on account of race. Only then is she at risk of suffering the constitutionally cognizable injuries identified by the Court in *Shaw*: stigmatization or "representational harms." *Hays*, 515 U.S. at 744-45; *see also Shaw I*, 509 U.S. at 646-49.

The motion to dismiss or affirm filed in this case fails utterly to demonstrate the kind of personalized standing necessary to invoke federal intervention in Alabama's political process. Appellees Peggy C. Kelley et al. (hereafter "Kelley") are white residents of Alabama who live in majority-white state legislative districts. They do not allege that they have been stigmatized in any way by being placed in those districts. They do not allege that they have suffered any representational harm. They do not even allege that they, *personally*, were classified on the basis of race. Rather, their complaint is essentially identical to the claim rejected in *Hays*: they live next to districts

that were deliberately drawn to be majority-black and they are "offended," Motion to Dismiss or to Affirm at 10 n.3, by the shape their own districts have as a result.

If appellees and the three-judge district court are right, then this Court was simply wasting its breath in *Hays* and *Shaw v. Hunt*, 517 U.S. 899, 904 (1996) (*Shaw II*), when it dismissed various plaintiffs' claims for lack of standing: under the theory advanced by appellees, plaintiffs who object to the creation of majority-black districts *in which they do not live* can always get federal courts to question the constitutionality of those districts by the simple expedient of challenging the districts in which they do live and claiming a "ripple effect."

With a new round of decennial reapportionment about to start within the next six months, plenary review is urgently needed to clarify that *Shaw I*, *Hays*, and *Shaw II* meant what they said when they identified a discrete set of potential injuries and limited standing to a discrete and identifiable group of potential plaintiffs. Otherwise, the redistricting litigation arising out of the post-1990 reapportionments that this Court has been facing for the last seven years will be but a drop in the bucket compared to the deluge that will follow the 2000 census.

I. LOWER COURTS ARE MISCONSTRUING *UNITED STATES V. HAYS* AS HAVING ELIMINATED THE ARTICLE III REQUIREMENT OF PERSONAL HARM IN CASES INVOLVING VOTING.

As we pointed out in our Jurisdictional Statement, the three-judge court's decision in this case turns standing into little more than an exercise in pleading. Both the three-judge court and Kelley seem to think that *Hays* is nothing more than a residency requirement: plaintiffs must plead that they are challenging the district in which they live, and, once they do, they are free to show that the state took race too much into

account in creating some *other* districts, which inevitably means that they too were affected.

But that approach completely misses *Hays*' point. The reason *Hays* focused on plaintiffs' residency as a component of standing was because the Court understood that *only* plaintiffs who live in a district that was the primary focus of alleged racial gerrymandering could allege they had been personally classified on the basis of race and, on account of that racial classification, were at risk of suffering the injuries identified in *Shaw I*. Thus, *Hays* clearly contemplated a set of individuals who live in a state but who do *not* have standing to challenge the redistricting plan because they were not personally classified on the basis of race and, therefore, could not have suffered stigmatic or representational harms.

Kelley falls within that set of individuals who lack standing. Nothing in her Motion to Dismiss or Affirm remotely establishes that she risks any representational harms. She does not show that she *personally* was classified in the basis of race. *See* Motion To Affirm at 10. Kelley makes no attempt to defend the "ripple effect" standard, which the district court invented as a substitute for the "primary focus" presumption of personal harm. In effect, what Kelley and the three-judge court perceive as a "straightforward" standing rule amounts to a judicially created *qui tam* cause of action in which the plaintiff's sole function is to invoke federal court oversight of the extent to which consideration of race has played a role in states' districting decisions.

It is important to recognize that this case does not involve an isolated misreading of *Hays*. This case is merely a harbinger of things to come. As Kelley points out, after our Jurisdictional Statement was filed, the United States Court of Appeals for the Eleventh Circuit (one of the circuits in which a great deal of voting-related litigation is filed) interpreted *Hays* to establish "a bright-line standing rule" which makes residency in the relevant

jurisdiction the sole requirement for any citizen to challenge any "illegal election scheme." *See* Motion To Affirm at 9-10. In *Dillard v. Baldwin County Commission*, 2000 WL 1275696 (11th Cir., Sept. 8, 2000) at *3-8; *accord, Wilson v. Minor*, 220 F.3d 1297, 1303 n.11 (11th Cir. 2000), the court of appeals accorded standing to private citizens who wished to challenge a judicial remedy imposed in a case brought under the Voting Rights Act, *despite* the fact that they had suffered no distinctive personal injury. According to the *Dillard* court, *Hays* broke with this Court's long line of precedents dismissing generalized grievances for lack of standing.[1] "[O]ne who resides in the area directly affected by the allegedly illegal voting scheme has standing to challenge that scheme," 2000 WL 1275696 at *7,[2] merely by fact of residence, without regard to whether the plaintiff was the victim of a racial classification. This radically liberalized law of standing developing in the Eleventh Circuit should make it clear that this Court's efforts in *Hays* and other *Shaw* cases to explain how its new, analytically distinct Fourteenth Amendment jurisprudence comports with the concrete, personalized injury demanded by Article III has gone for naught. There is an urgent need for this Court to clarify both the nature of the racial classification it has discerned in

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[1] Specifically, it attempted to distinguish *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997), and *Raines v. Byrd*, 521 U.S. 811 (1997). *Dillard*, 2000 WL 1275696 at *6-8.

[2] In *Wilson v. Minor*, the same Eleventh Circuit panel majority opined that private plaintiffs challenging modification of the number of single-member district seats had standing "to vindicate important personal interests in maintaining the election system that governed their exercise of political power, a democratically established system that the district court's order had altered." 220 F.3d at 1303 n.11. But no individual voter suffers a loss of "political power" merely by the addition or subtraction of the number of seats. *E.g., see Prejean v. Foster*, 2000 WL 1336282 (5th Cir., Oct. 2, 2000) at *13 ("When a legislative body is apportioned into districts, every citizen retains equal rights to vote for the same number of representatives, even if not for all of them, and every citizen's ballot is equally weighed.").

districts constructed for predominately racial reasons and how, to be actionable, any such classification must produce particularized harm to the plaintiff personally.

II. THE MOTION TO AFFIRM DEMONSTRATES THAT PLENARY REVIEW BY THIS COURT IS NEEDED TO UPHOLD THE PRINCIPLES OF FEDERALISM REAFFIRMED IN *GROWE V. EMISON*.

This Court cited the states' sovereign interest in controlling the structures of their democratic branches of government when it held in *Growe v. Emison*, 507 U.S. 25, 33 (1993), "that state courts have a significant role in redistricting" which this Court's case law has "specifically encouraged." Kelley's arguments in defense of the district court's refusal to dismiss her claims on grounds of laches or preclusion graphically demonstrate the importance of this Court noting probable jurisdiction if *Growe* is not to become a dead letter.

Kelley boldly contends that she and her fellow plaintiffs had an unquestionable right to "refuse[] to present their claims to the state court," notwithstanding the district court's stay of their federal action, in compliance with *Growe*, to afford them the opportunity to do so. Motion To Affirm at 18. Indeed, she blames the delay in her trial below on "the federal district court's stay from December 1997 to January 1999 while the Rice proceedings continued in state courts at trial and upon appeal." *Id.* at 19. Apparently, the district court agreed, and its failure to require an accounting from the Kelley plaintiffs for their forum shopping strategy renders the *Growe* doctrine meaningless.

Similarly, with respect to the preclusion and *Rooker-Feldman* issues, Kelley makes a hash of the federalism concerns expressed in *Growe*. She asserts, erroneously, that Alabama's standard of mootness, as applied by the state's supreme court, is different from the federal standard; that the

federal court not only acted properly when it refused to accord the state court judgments full faith and credit, but that it actually had an obligation to discount the likelihood that Alabama's government would accomplish the next redistricting in timely fashion. Motion To Affirm at 21-24. Ignoring the district court's ripple effect standard, Kelley argues that the residency-specific limitation on *Shaw* claims exempts federal courts from the operation of the *Rooker-Feldman* doctrine. Motion To Affirm at 24-28. *Growe*, she says, does not address any of these issues. Motion To Affirm at 27. The merits of preclusion, *Rooker-Feldman* and mootness aside, Kelley's position would have the federal judiciary adopt an attitude of suspicion and contempt, not of deference and respect, when it comes to Alabama's interest in controlling its own redistricting process.

Under Kelley's formulation, a state court's determination of the constitutionality of a redistricting scheme will *always* be subject to review and rejection by federal district courts, since there will almost *always* be a plaintiff who was not a party to the state court proceedings. (Indeed, a group of individuals who want to ensure themselves two bites at the apple can do so through the simple expedient of having *some* members of the group file a lawsuit in state court. If the state court upholds the plan, they can field a second team to challenge the plan in federal court.) That cannot be the law.[3] Unless this Court wants to authorize wholesale repeat litigation over reapportionment plans, it should note probable jurisdiction in this case to make clear that *Growe* meant what it says.

[3] This issue is also addressed in the "State Appellants' Brief on the Merits" at 43-49, *Hunt v. Cromartie*, Nos. 99-1864 and 99-1865.

III. THE MOTION TO AFFIRM CRYSTALLIZES THE CONFLICT BETWEEN THE THREE-JUDGE COURT'S DECISION AND FIRST AMENDMENT FREEDOMS.

Kelley's motion to affirm dramatically demonstrates why the decision below poses an imminent danger to the most sacred American freedom, the freedom of political speech and association. Kelley contends that, contrary to this Court's repeated disclaimers, *Shaw* imposes prohibitively tougher requirements on predominantly black political organizations than on all other political associations. She misinterprets *Bush v. Vera*, 517 U.S. 952 (1996), to mean that the Alabama Democratic Conference (ADC) and other voluntary, predominantly black political organizations in Alabama cannot use block level census data to identify their supporters unless they "know the political views of *every* black citizen in these census blocks." Motion To Affirm at 14 (emphasis added). There is no constitutional bar to associations of Republicans, farmers, union members, senior citizens, etc. making informed use of census demographics to negotiate legislative districts favorable to their interests. But, in Kelley's view, representatives of African Americans must make sure that not a single black resident in a block assigned to a majority black district is among the small number of black voters who do not solidly support ADC, the Alabama New South Coalition, or one of the other political organizations voluntarily formed by black citizens.[4] Even if no such non-affiliated black voter is a plaintiff, Kelley believes that white citizens like herself, who do not even live in the same district as these non-affiliated black voters, should have third-party standing to allege and prove that representatives of a community of which they are not members

[4] The district court found that "ADC-endorsed candidates (who are always Democrats) carry a large majority of the black vote." J.S. App. 25a. The state court set the level of black voters' support of ADC, the Alabama New South Coalition and the Jefferson County Citizens' Coalition at "over 80 %." J.S. App. 163a.

had "really just assumed that *all* black citizens in Alabama share the same political views[, which would] reflect stereotyping, not good citizenship." Motion To Affirm at 14 (emphasis added). Nothing could make clearer the essential *qui tam* character of the Kelley appellees' claims and their mistaken belief that, through its *Shaw* jurisprudence, this Court has set federal courts up to be commissariats of official political correctness.

Kelley misapprehends the nature of the conflict between the district court's suspect treatment of ADC's "skillful politics" in the redistricting process and the First Amendment rights of the black citizens who support these voluntary associations. Motion To Affirm at 17. ADC did not assert some First Amendment "right" to have the state adopt the districts it advocated. Motion To Affirm at 15. Rather, it defended its freedom to enjoy the benefits of the political bargains it struck with other negotiators, just like any other political organization. The question is not whether "the alleged associational interest [could] satisfy strict scrutiny," as the district court thought, Motion To Affirm at 14 (citing J.S. App. 50a), but whether it should have been subjected to strict scrutiny at all.

Kelley's primary argument about how the district court's decision can be squared with the First Amendment is a truly frightening one. Kelley agrees that the First Amendment protects the freedom of African Americans voluntarily to associate in the political arena and the freedom of their political organizations to constitute their membership in the same manner as other political parties. Motion To Affirm at 15-16 and n.6. She agrees that ADC is free to advocate the creation of legislative districts based on a political message that blacks are entitled to equitable representation. *Id.* But she contends that the legislature violates the Fourteenth Amendment when it listens to the constitutionally protected speech of the ADC and draws the districts the ADC advocates. Motion To Affirm at

16-17 and n.6. In short, Kelley urges, the state has a constitutional duty to reject the political speech and district designs advocated by African Americans and their associations. This contention may sound absurd when it is stated plainly, but it fairly characterizes the district court's holding, which Kelley quotes, that "the essence" of a *Shaw* claim is not to prevent injury to individual plaintiffs but to condemn the state's adoption of "the message that political identity is, or should be, predominantly racial." Motion To Affirm at 16-17 (quoting J.S. App. 14a and *Bush v. Vera*, 517 U.S. at 980-81).

Contrary to Kelley's argument, this Court has made it clear that districts designed to aggregate the supporters of voluntary political organizations are not subject to strict scrutiny, even if they correlate with voters' race. *Bush v. Vera*, 517 U.S. at 968; *accord*, *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact.") (citations omitted). Any other principle, of course, would create an irreconcilable conflict between the Equal Protection Clause and the First Amendment. That appellees and the district court have failed to grasp this elemental point is one of the most compelling reasons why this Court should grant plenary review to clarify the nature of the racial classification made suspect by *Shaw*.

Kelley's main thesis, that *Shaw* has created a category of political speech that African Americans are free to advocate but that state government may not adopt, would entail a perverse reversal of this Court's historical role in First Amendment jurisprudence. It recalls the insurrection laws, descended from ante-bellum slave statutes, that the Southern states invoked in the twentieth century to suppress concerted political action by their black citizens. In the notorious Angelo Herndon case, for example, this Court held that Georgia's prosecution under its

insurrection law of a young black Communist organizer for advocating creation of a majority black jurisdiction in the Black Belt violated the freedoms of speech and assembly guaranteed by the First Amendment. *Herndon v. Lowry*, 301 U.S. 242, 263-64 (1937). As Professor Zechariah Chafee noted in his magisterial treatise, *Free Speech in the United States* (1941), Herndon's real crime was that he "sought to put the Fifteenth Amendment into wider effect." *Id.* at 392.

This Court has long recognized that "[s]elf-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well" and that "[j]udicial incursions in this area may interfere with those aspects of democratic self-government that are most essential to it." *Cabell v. Chavez-Salido*, 454 U.S. 432, 439-40 (1982). The approach taken by the three-judge court threatens this fundamental principle of democracy, because it tells black citizens that they cannot participate in the process of self-government in the same way that every other group of citizens enjoys. To say that the Constitution requires that the state reject black political groups' districting proposals because they reflect their members' views about how politics ought to be organized, regardless of whether these proposals actually harm individuals, amounts to a demand for suppression of African Americans' viewpoint. As this Court has repeatedly held, viewpoint discrimination with respect to political speech poses the most serious problems under the First Amendment.

Thus, this Court should note probable jurisdiction to clarify that a state is not required to reject the political proposals of voluntary associations of African Americans simply because they reflect a message that some individual white voters dislike.

Respectfully submitted,

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